

Chief District Judge Ricardo S. Martinez

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

ELLEN BRENNAN REICHE,

Defendant.

Case No. CR 20-215 RSM

OPPOSITION TO MOTION TO  
SUPPRESS

Noted for: August 13, 2021

Defendant Ellen Brennan Reiche moves to suppress evidence found in a grocery bag she was carrying at the time of her arrest as well as statements she made before her arrest. Dkt. 38. Her motion lacks merit. She made her incriminating statements to the deputies before she was in custody. And the search of the grocery bag was a proper search incident to arrest, and even if it were not, the wire, drill, and other items inside were in plain view. The Court should deny her motion.

**FACTS**

Reiche is charged with one count of violence against a railroad carrier, and conspiring and attempting to do the same, in violation of 18 U.S.C. §§ 1992(a)(5), (a)(10), (c)(1), and 2. Dkt. 15. The indictment alleges that she impaired the operation of a railroad signal system by placing a wire shunt across Burlington Northern Santa Fe (“BNSF”) railroad tracks. *Id.*

1 The core facts needed to resolve Reiche's motion, as taken from the arrest reports and  
2 other discovery in this case, are not in dispute. On November 28, 2020, near midnight, a  
3 BNSF police officer received an alert from a camera placed along the BNSF Bellingham  
4 Subdivision tracks in Whatcom County. An image from the camera showed one person  
5 standing and possibly a second person kneeling over the tracks. BNSF property is private  
6 and closed to the public. The officer contacted the Whatcom County Sheriff's Office, which  
7 dispatched deputies to the scene.

8 The BNSF officer was especially concerned about these trespassers because there had  
9 been dozens of incidents of vandalism and shunting on railroad tracks in this area and nearby  
10 areas since January 2020. A shunt refers to a wire placed between one rail and the other.  
11 Once connected, the shunt can interfere with the train signaling system and related systems,  
12 including railroad crossings. In one of the prior incidents, on October 11, 2020, a shunt  
13 caused a train to engage emergency brakes. The sudden and unexpected application of the  
14 brakes caused a draw bar on one of the rail cars to break, separating the train in two, which  
15 could have led to a derailment. Twelve cars in that train carried hazardous materials.

16 Deputies Chambers and Streubel responded to the scene on November 28, 2020. They  
17 approached the area from different sides. Deputy Chambers used a light from his patrol  
18 vehicle and spotted two black objects approximately 100 yards from his location. He realized  
19 these objects were people crouched down on the ground between the rails of the tracks. He  
20 observed them get up and start to flee, at which point he identified himself and ordered them  
21 to stop. They complied. As Deputy Chambers got closer, he saw that the two individuals—  
22 later identified as Reiche and co-defendant Samantha Brooks—were dressed in all black and  
23 had dirt on their pants and the fronts of their shirts. Reiche was holding a paper grocery bag.

24 Deputy Chambers identified and ran records checks on Reiche and Brooks. Deputy  
25 Steubel arrived and assisted. The deputies had Reiche and Brooks stay put while they  
26 investigated the situation. In a conversation with the deputies, Reiche and Brooks said they  
27 were on the tracks looking for Brooks' lost keys. They said they had been in the area earlier  
28 and had dropped a set of keys, so they had come back to look for them. This statement was

1 odd for several reasons, including that they were not carrying flashlights or any other source  
2 of light, and Brooks appeared to have her keys on her person. Deputy Chambers asked  
3 Reiche what was in the paper bag she was holding, and she responded that it was leftovers  
4 from Thanksgiving dinner. She said they had worried they might get hungry while looking  
5 for the keys. Incongruously, Brooks later said she does not celebrate Thanksgiving, and  
6 Reiche nodded in agreement as Brooks said that.

7 An agent from the Federal Bureau of Investigation's Joint Terrorism Task Force  
8 arrived on the scene and explained to Deputy Chambers the recent issues with shunting in  
9 the area. The agent explained that the wires are frequently hidden under rocks. Deputy  
10 Chambers went to the place along the tracks where he had spotted the defendants, and he  
11 saw a patch of rocks that had no frost, while the surrounding rocks and rails were covered in  
12 frost, suggesting that those rocks had recently been moved. In that spot he discovered a black  
13 wire buried under the rocks connecting the two rails together. A BNSF representative later  
14 explained that this shunt could have interfered with a nearby railroad crossing, although it  
15 was operational only momentarily.

16 The deputies decided to arrest Reiche and Brooks for malicious injury to railroad  
17 property and second-degree criminal trespassing. The deputies handcuffed the defendants  
18 and read them their *Miranda* rights. Reiche invoked her right to counsel. The bag that Reiche  
19 had been holding until being handcuffed was placed on the ground next to her. The deputies  
20 could see inside through the open top that it contained black wire, a cordless drill with a  
21 brass brush bit, and other items. A wire brush is frequently used when making a shunt to  
22 increase the adhesion of the wire to the rails.<sup>1</sup>

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25 <sup>1</sup> Even if the deputies had not seen inside and searched the paper bag on the scene, it might  
26 have been inventoried as part of booking for arrest. This eventuality, which can be explored  
27 at an evidentiary hearing if needed, would support a finding of inevitable discovery. *See,*  
28 *e.g., United States v. Brown*, No. 17-CR-058, 2017 WL 8941247, at \*10 (D. Nev. Aug. 14,  
2017) (“the firearm would have been discovered inevitably through lawful inventory  
procedures”). But there are other independent bases to deny Reiche's motion.

## ARGUMENT

### I. Reiche's Pre-Arrest Statements Are Admissible

#### A. Applicable Law

*Miranda* mandates “a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination.” *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011). Under *Miranda*, when police question a person in custody, “He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). In addition, “the prosecution at trial” must show that police gave these four “warnings” and that the person “waived” his rights before it may use any statement made by the person while in custody “against him.” *Id.*

The government may not use a statement taken in violation of *Miranda* “at trial in [its] case in chief.” *Oregon v. Elstad*, 470 U.S. 298, 317 (1985); *see also United States v. Gomez*, 725 F.3d 1121, 1125-26 (9th Cir. 2013) (“Statements obtained in violation of *Miranda* generally are inadmissible in the government’s case-in-chief.”). The government may, however, use a statement taken in violation of *Miranda* to impeach the defendant. *See id.* at 226; *United States v. Rosales-Aguilar*, 818 F.3d 965, 970 (9th Cir. 2016).

“[P]olice officers are not required to administer *Miranda* warnings to everyone whom they question.” *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). *Miranda* warnings must be given only before a “custodial interrogation.” *Miranda*, 384 U.S. at 444. “[C]ustodial interrogation . . . mean[s] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* The test for custody “examine[s] all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” *Stansbury v. California*, 511 U.S. 318, 322 (1994) (internal quotation marks and citation omitted). The

officers’ “subjective views” do not figure into this analysis. *Id.* at 323. Instead, the Ninth Circuit has identified the following non-exhaustive list of relevant factors: “(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual.” *United States v. Hayden*, 260 F.3d 1062, 1066 (9th Cir. 2001).

#### **B. Reiche Was Not in Custody When She Made the Challenged Statements**

Reiche made several statements before her arrest that are incriminating because of their implausibility. She said, for example, that the paper bag she was carrying contained leftover Thanksgiving dinner. She now asks the Court to suppress all her statements, arguing that the deputies violated her *Miranda* rights. Her argument fails.

When Reiche made the challenged statements, the deputies were only beginning to sort out the situation that night. They had briefly detained Reiche and Brooks, based on reasonable suspicion of criminal activity, to “investigate the circumstances that provoke suspicion.” *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984). It was a quintessential *Terry* stop at this stage, and given the “comparatively nonthreatening character of detentions of this sort,” the Supreme Court has never “suggest[ed] . . . that *Terry* stops are subject to the dictates of *Miranda*.” *Id.* at 440. A routine investigatory detention is simply not “custody” for *Miranda* purposes.

All of the surrounding circumstances confirm that the deputies’ conversation with Reiche was not a custodial interrogation. For much of the time, there were only two members of law enforcement at the scene. The conversation took place outside. Although Reiche was being temporarily detained, the deputies did not tell her she was under arrest or handcuff her (that is until they discovered the shunt and actually arrested her, at which point they promptly gave the *Miranda* warnings). The deputies’ questioning was polite and conversational. And Reiche and Brooks remained together rather than being separated from one another. For these reasons and more, *Miranda* warnings were not required.

Reiche argues she was in custody from the first moments of the encounter when she tried to flee the scene and Deputy Chambers ordered her “to stop.” Dkt. 38 at 6. But the cases she cites to support that argument are distinguishable or inapposite. In one of them, *United States v. Craighead*, 539 F.3d 1073 (9th Cir. 2008), the Ninth Circuit held that the defendant was in custody for *Miranda* purposes because eight law enforcement officers entered his home, physically isolated him from others, and questioned him “in the dark recess of the back storage room.” *Id.* at 1087. And in *United States v. Beraun-Panez*, 812 F.2d 578 (9th Cir. 1987), which Reiche also cites, officers questioned the defendant with “relentlessness” and “psychological coercion,” and deliberately isolated him from a co-worker. *Id.* at 580-82. Neither *Craighead* nor *Beraun-Panez* resembles this case.

In addition, Reiche cites *United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006), but the question in that case involved the timing of the *Miranda* warnings during an interrogation of a suspect in custody. Similarly, in another case she cites of the same name, *United States v. Williams*, 842 F.3d 1143 (9th Cir. 2016), the issue was whether booking questions asked of a defendant arrested for murder qualified as “interrogation” under *Miranda*. *Id.* at 1145-46. These cases do not speak to the key question here, which is whether Reiche was in custody in the first place. For all the reasons noted, she was not in custody. Thus, no matter whether the deputies’ questions would constitute “interrogation,” her *Miranda* claim fails.<sup>2</sup>

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<sup>2</sup> Reiche argues that “[a]n evidentiary hearing is necessary” to resolve her *Miranda* claim, Dkt. 38 at 4, but her authority for this argument is inapposite. She cites *United States v. Arbolaes*, 450 F.3d 1283 (11th Cir. 2006), a case in which the defendant was “in custody for the purposes of *Miranda*” and the question was whether the defendant knowingly and intelligently waived his *Miranda* rights. *Id.* at 1292. The Eleventh Circuit wrote that the district court should have held a hearing to determine the validity of the waiver and related issues before admitting the defendant’s confession. *Id.* Here, by contrast, undisputed facts establish that Reiche was not in custody when she made the challenged statements—and that resolves her *Miranda* claim.

## II. The Search of the Paper Bag Was Lawful

### A. Applicable Law

The “‘search incident to arrest’ principle” provides that “[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape.” *Chimel v. California*, 395 U.S. 752, 762-63 (1969). The arresting officer also may “search for and seize any evidence . . . to prevent its concealment or destruction.” *Id.* at 763. The permissible scope of a search incident to arrest extends to “the arrestee’s person and the area within his immediate control.” *Davis v. United States*, 564 U.S. 229, 232 (2011) (internal quotation marks and citation omitted). The “arrestee’s person” includes items on his or her person, such as a cigarette package. *United States v. Robinson*, 414 U.S. 218, 236 (1973).

The propriety of a search incident to arrest does not turn on a “case-by-case adjudication” of the danger to the arresting officer or the likelihood that the officer would find evidence. *Id.* at 235; *see also Birchfield v. North Dakota*, 136 S. Ct. 2160, 2176 (2016) (affirming that “[t]he permissibility of” searches incident to arrest “does not depend on whether a search of a *particular* arrestee is likely to protect officer safety or evidence”). Instead, the question is whether the arrest is lawful. *Robinson*, 414 U.S. at 235. A lawful arrest means a search incident to that arrest is lawful too. *Id.* As the Supreme Court said in *Robinson*, “A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.” *Id.*; *see also Virginia v. Moore*, 553 U.S. 164, 177 (2008) (affirming that officers may perform a search incident to a lawful arrest, and that an arrest is lawful if based on probable cause).

### B. The Search of the Bag Was Incident to Reiche’s Lawful Arrest

Deputies Chambers and Streubel lawfully arrested Reiche based on probable cause to believe she had committed multiple crimes, including malicious injury to railroad property. As part of the arrest, they searched the paper grocery bag she had been holding throughout the encounter. This was a proper search incident to the lawful arrest. The bag was property

1 “immediately associated with the person of the arrestee” because Reiche was holding it until  
 2 more or less the moment of her arrest. *United States v. Chadwick*, 433 U.S. 1, 15 (1977); *see*  
 3 *Robinson*, 414 U.S. at 236.<sup>3</sup> And the search of the bag occurred close in time to her arrest.  
 4 *See United States v. Caseres*, 533 F.3d 1064, 1073 (9th Cir. 2008) (reviewing cases on the  
 5 contemporaneousness of search and arrest); *cf. United States v. Monclavo-Cruz*, 662 F.2d  
 6 1285, 1288 (9th Cir. 1981) (search of purse incident to arrest not proper where it occurred  
 7 “an hour later at the station”). Nothing more was required to make this a valid search  
 8 incident to arrest.

9 Reiche argues that this was in fact not a valid search incident to arrest, principally  
 10 relying on *United States v. Maddox*, 614 F.3d 1046 (9th Cir. 2010) to support her argument.  
 11 But *Maddox* involved materially different facts. In that case, after arresting a defendant  
 12 during a traffic stop, handcuffing him, and placing him in the back of a patrol car, the officer  
 13 returned to the defendant’s vehicle, seized his keychain, and opened a metal vial that was  
 14 hanging from the keychain. *Id.* at 1047. The Ninth Circuit held that this search of the vial  
 15 was improper because, although the keychain had been within the defendant’s “immediate  
 16 control while he was arrested,” the “subsequent events—namely [the officer’s] handcuffing  
 17 of [the defendant] and placing [him] in the back of the patrol car—rendered the search  
 18 unreasonable.” *Id.* at 1048. Here, by contrast, the grocery bag was physically in Reiche’s  
 19 possession at the time of arrest, rather than simply nearby. This puts the search in the  
 20 *Robinson* line of cases, under which the defendant’s proximity to the searched item at the  
 21 time of the search does not matter. *See United States v. Hill*, No. CR 10-261, 2011 WL  
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23  
 24 <sup>3</sup> Even if the bag were seen as “luggage” rather than property “immediately associated with  
 25 the person of the arrestee,” it was still subject to search for being in an area within Reiche’s  
 26 immediate control. *Chadwick*, 433 U.S. at 15; *see United States v. Andersson*, 813 F.2d 1450,  
 27 1455 (9th Cir. 1987) (affirming search incident to arrest of suitcase sitting on bed next to  
 28 where arrestee was standing); *United States v. Maldonado-Espinosa*, 968 F.2d 101, 104 (1st  
 Cir. 1992) (“government agents, when arresting a person, may constitutionally search an  
 arrested person’s nearby carry-on bag”).

90130, at \*8 (N.D. Cal. Jan. 10, 2011) (distinguishing *Maddox* because searched item was “found on [the defendant’s] person”).<sup>4</sup>

Reiche also relies on a decision from this district, *United States v. Holbrook*, No. 15-CR-5392, 2016 WL 454843 (W.D. Wash. Feb. 5, 2016), but *Holbrook* actually supports the government’s argument. In *Holbrook*, which involved shoplifting and other charges, officers arrested the defendant and searched a shopping cart that was about five feet from where she was seated (with an officer standing in between), and also searched a bag and other personal possessions that were on a couch next to the defendant. *Id.* at \*2-5. The *Holbrook* decision distinguished between these two searches, finding that the search of the personal possessions was proper while the search of the cart was not, because the “personal possessions were within her immediate control” and searched contemporaneously to her arrest. *Id.* Here, the search of Reiche’s bag is more closely analogous to the search of the defendant’s bag in *Holbrook* rather than the shopping cart. The bag was within an area of Reiche’s immediate control (in fact, even more than that, it was on her person). For this reason, as in *Holbrook*, the search of the grocery bag incident to Reiche’s arrest was valid.

### C. The Items Inside the Bag Were in Plain View

Even if the search of the grocery bag were not a proper search incident to arrest, the deputies were permitted to seize the items inside because those items were in plain view. The deputies could see into the bag through the opening at the top without manipulating the bag. Having just found a shunt on the railroad tracks, it was immediately apparent that the wire, drill, and other items inside the bag were incriminating evidence. The deputies therefore

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<sup>4</sup> Even if the proximity did matter here, the arrest reports indicate that the deputies looked inside the grocery bag as they arrested Reiche and before placing her in a patrol car. Reiche asserts in her motion that she was “moved . . . to the police car” prior to the search of the bag, Dkt. 38 at 9, but this claim is not supported by the arrest reports or other discovery in the case, and Reiche has not submitted a declaration or pointed to any other evidence to back it up. In any event, this dispute is of no moment because her proximity to the bag is irrelevant, and for the additional reason that the items in the bag were in plain view, as noted below.

1 could seize those items under the plain view exception to the warrant requirement. *See, e.g.,*  
2 *United States v. Hudson*, 100 F.3d 1409, 1420 (9th Cir. 1996).

3 **CONCLUSION**

4 For all these reasons, the Court should deny Reiche's motion to suppress.

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6 Dated: August 6, 2021.

Respectfully submitted,

7  
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